

INTERIM RULEMAKING NOTICE FORM

Proposed Interim Rule Number 2019-4 Rule Number He-M 204

1. Agency Name & Address:

**Dept. of Health & Human Services
Bureau of Behavioral health
105 Pleasant St., Main Bldg
Concord, NH 03301**

2. RSA Authority: RSA 126:27

3. Federal Authority: _____

4. Type of Action:

Adoption X

Amendment _____

Repeal _____

Readoption _____

Readoption w/amendment _____

5. Filing Date: **January 22, 2019**

6. Short Title: **Rights Protection Procedures**

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

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The proposed rules may be viewed and downloaded at:

<http://www.dhhs.nh.gov/oos/aru/comment.htm>

8. Summary explaining the effect of the rule:

The proposed interim rule, He-M 204, describes the procedures for protection of the rights of persons applying for, eligible for, and receiving services which are funded, monitored, or regulated by the department.

The rule expired on 1/20/19, and this proposal will minimize the time between expiration of the rule and its subsequent readoption pursuant to RSA 541-A:19, I(e). The proposed interim rule is being adopted without changes from the expired rule.

9. Listing of people, enterprises, and government agencies affected by the rule:

The groups affected by this rule are individuals receiving mental health services from state funded facilities and community mental health programs or providers.

10. Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement.

Rule	Statute Implemented
He-M 204.01	RSA 135-C:56-57, RSA 171-C:19
He-M 204.02	RSA 135-C:56-57, RSA 171-C:19
He-M 204.03	RSA 135-C:56-57, RSA 171-C:19
He-M 204.04	RSA 135-C:56-57, RSA 171-C:19
He-M 204.05	RSA 135-C:56-57, RSA 171-C:19
He-M 204.06	RSA 135-C:56-57, RSA 171-C:19
He-M 204.07	RSA 135-C:56-57, RSA 171-C:19
He-M 204.08	RSA 135-C:56-57, RSA 171-C:19
He-M 204.09	RSA 135-C:56-57, RSA 171-C:19
He-M 204.10	RSA 135-C:56-57, RSA 171-C:19
He-M 204.11	RSA 135-C:56-57, RSA 171-C:19
He-M 204.12	RSA 135-C:56-57, RSA 171-C:19

11. Summary of the effect upon the state if the rule were not adopted:

If the interim rule were not adopted, the Department would not have a mechanism to ensure that there are procedures in place for the protection of the rights of individuals with mental illness, and the state could not assist the Commissioner with ensuring said rights are protected in accordance with RSA 171-A:19.

12. Proposed date of review by the Joint Legislative Committee on Administrative Rules:

February 15, 2019

13. The fiscal impact statement prepared by the Legislative Budget Assistant, if applicable.

Not applicable.

CHAPTER He-M 200 PRACTICES AND PROCEDURES

Adopt He-M 204, previously effective 1-20-11 (Document #9820), and expired 1-20-19, to read as follows

He-M 204 RIGHTS PROTECTION PROCEDURES FOR MENTAL HEALTH SERVICES

He-M 204.01 Purpose. The purpose of these rules is to define the procedures for protection of the rights of persons applying for, eligible for, or receiving mental health services which are funded, monitored

or regulated by the department, and state mental health facilities, community mental health programs, community mental health providers or their subcontracted service providers.

He-M 204.02 Definitions.

(a) “Abuse” means an act or omission by an employee, subcontracted service provider, consultant, student, intern or volunteer of a program which is not accidental and harms or threatens to harm an individual’s physical, mental or emotional health or safety and includes emotional abuse, physical abuse, and sexual abuse.

(b) “Administrator” means the chief administrator for the bureau of behavioral health, or the bureau of homeless and housing services.

(c) “Agency” means a facility, community mental health program, community mental health provider, or any of their subcontracted service providers.

(d) “Agency director” means the person responsible for the overall administration or operation of a CMHP, community mental health provider, peer support agency, emergency shelter, or facility or his or her designee.

(e) “Bureau of behavioral health (BBH)” means the bureau of behavioral health of the department of health and human services.

(f) “Coercion” means an act by an employee, subcontracted service provider, student, intern, or volunteer, which is designed to compel an individual to act in clear opposition to the preference of the individual excluding involuntary admissions, revocations of conditional discharge, the imposition of emergency treatment, and as otherwise prescribed by law or rule.

(g) “Commissioner” means the commissioner of the department of health and human services or his or her designee.

(h) “Community mental health program (CMHP)” means “community mental health program” as defined in RSA 135-C:2, IV.

(i) “Community mental health provider” means a medicaid provider of community mental health services that has been approved by the commissioner to provide specific mental health services pursuant to He-M 426.

(j) “Complaint” means:

(1) Any allegation or assertion that a right of an individual as set forth in He-M 309, rights of persons receiving mental health services in the community, He-M 314 rights of persons using emergency shelters or He-M 311, rights of persons in state mental health facilities, have been violated; or

(2) Any allegation or assertion that the department or an agency has acted in an illegal or unjust manner with respect to an individual or category of individuals.

(k) “Complaint investigator” means the person who is designated by office of client and legal services or a facility to investigate, resolve or take other appropriate action on complaints.

(l) “Complaint manager” means a person designated by the community mental health program or the community mental health provider who is responsible for receiving, managing, and resolving complaints in accordance with these rules.

(m) “Department” means the New Hampshire department of health and human services.

(n) “Emergency shelter” means any facility, the primary purpose of which is to provide temporary shelter for homeless individuals or families. The term does not include transitional housing designed to provide housing as well as educational or rehabilitative programs and services for a person or family for at least 6 consecutive months.

(o) “Emotional abuse” means any of the following when the act results, or is likely to result in the mental anguish or emotional distress of an individual:

(1) The misuse of power, authority or both;

(2) Harassment; such as:

a. Intimidation;

b. Humiliation; or

c. Degradation; or

(3) Unreasonable confinement.

(p) “Exploitation” means the use of an individual's person or property for another's profit or advantage, or breach of a fiduciary relationship through improper use of an individual's person or property, including situations where a person obtains property or services from an individual through undue influence, harassment, deception, fraud, or duress.

(q) “Facility” means New Hampshire hospital, Glencliff home, or any other treatment program designated under RSA 135-C:26.

(r) “Facility administrator” means the chief executive officer at New Hampshire hospital or administrator at Glencliff home or any other treatment program designated under RSA 135-C:26.

(s) “Founded” means that the facts indicate that the rights of an individual under He-M 309, He-M 314, or He-M 311 were violated.

(t) “Guardian” means a person appointed by the court pursuant to RSA 464-A:9 to have care and custody of an individual, or the parent or legal custodian of a minor child.

(u) “Individual” means a consumer as defined by He-M 401, a client as defined in He-M 311, or a guest as defined by He-M 314, who has applied for, has been found eligible for, or is receiving state-funded services from an agency, emergency shelter, or peer support agency, or a guardian acting on his or her behalf.

(v) “Neglect” means an act or omission which results or is likely to result in the deprivation of essential services or supports necessary to maintain the minimum mental, emotional, or physical health and safety of an individual.

(w) “Office of client and legal services (OCLS)” means the client and legal services section of the department established by RSA 171-A:19 to, in part to assist the commissioner in responding to complaints by or on behalf of persons with mental illness.

(x) “Physical abuse” means the use of physical force which results or is likely to result in physical injury to an individual.

(y) “Restraint” means:

(1) Any drug or medication when it:

- a. Is used as a restriction to manage an individual’s behavior or restrict the individual’s freedom of movement; and
- b. Is not a standard treatment or dosage for the individual’s condition, in that its overall effect reduces an individual’s ability to effectively or appropriately interact; or

(2) Any manual method, physical or mechanical device, material or equipment that immobilizes an individual or reduces the ability of an individual to move his or her arms, legs, head, or other body parts freely but does not include devices, such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or other methods that involve the physical holding of an individual, if necessary, for the purpose of:

- a. Conducting routine physical examinations or tests;
- b. Protecting the individual from falling out of bed; or
- c. Permitting the individual to participate in activities without the risk of physical harm.

(z) “Seclusion” means the involuntary confinement of an individual who:

- (1) Is placed alone in a room or area from which the individual is physically prevented, by lock or person, from leaving; and
- (2) Cannot or will not make an informed decision to agree to such confinement.

(aa) “Sexual abuse” means contact or interaction of a sexual nature between an individual and an employee of, a consultant or a volunteer for a program.

(ab) “Unfounded” means that the facts do not indicate that the rights of an individual under He-M 309, 314, or He-M 311 were violated.

(ac) “Unreasonable confinement” means any confinement which is neither medically necessary nor necessary for the protection of a person or to prevent harmful behavior, or confinement used with punitive intent.

He-M 204.03 Responsibility for Rights Protection.

(a) Each agency shall have the responsibility for rights protection in accordance with these rules both in the services it operates and in the services it provides by contract with third parties.

(b) Agencies that are operated directly by the department shall have the responsibility for rights protection in accordance with these rules.

(c) Agencies shall comply with the complaint procedures described in these rules.

(d) An emergency shelter shall have complaint procedures that comply with He-M 314.09.

(e) A peer support agency shall have complaint procedures that comply with He-M 315.10.

(f) Each agency shall have one or more staff persons designated as complaint managers to receive complaints in accordance with these rules at all times.

(g) Each emergency shelter and peer support agency shall have one or more staff persons designated as complaint investigators to receive complaints in accordance with these rules at all times.

He-M 204.04 Allegations of Abuse, Neglect, and Exploitation.

(a) Any person who suspects or believes in good faith that an individual has been subject to abuse, neglect, or exploitation, as defined in RSA 161-F, RSA 169-C, or these rules shall:

(1) Take all practicable steps to protect the individual; and

(2) Report the instance, including the issues presented and the actions taken, of abuse, neglect or exploitation to BEAS or DCYF, as appropriate, OCLS and the agency director.

(b) BEAS shall investigate allegations of abuse, neglect, and exploitation in accordance with RSA 161-F.

(c) DCYF shall investigate allegations of abuse, neglect, and exploitation in accordance with RSA 169-C.

(d) Upon completion of the investigations that occurred in accordance with (b) and (c) above, BEAS or DCYF, respectively, shall report the findings to OCLS and the appropriate agency.

(e) In the event of the death of an individual where there are or were allegations of abuse, neglect, and exploitation as defined by these rules or under RSA 161-F and RSA 169-C, the agency shall report on the circumstances surrounding the death to the department, in compliance with department's quality assurance measures under RSA 126-A:4, IV.

He-M 204.05 Complaints.

(a) A complaint as defined in He-M 204.02 (j) may be made by any person, including but not limited to:

(1) An individual;

(2) An individual's guardian;

(3) An applicant for services; or

(4) An employee of:

a. The department; or

b. An agency.

- (b) A complaint may be made orally or in writing to any employee of an agency.
- (c) Complaints alleging coercion, restraint, seclusion, or retaliation may be made to the complaint manager or to OCLS orally or in writing.
- (d) Agency staff shall put the complaint in writing and seek to have it signed by the complainant.
- (e) Agencies shall designate a staff person to receive and respond to complaints as described in (g) through (k) below.
- (f) All complaints shall be submitted to the complaint manager except for as described in He-M 204.11.
- (g) At any point in the complaint process, the individual shall have the right to:
 - (1) Have a person advocate on his or her behalf, including but not limited to:
 - a. A peer support advocate;
 - b. An advocate from the disabilities rights center; or
 - c. A person designated by the individual to function in that capacity;
 - (2) Decide whether the complaint is resolved formally or informally; and
 - (3) Elect a formal resolution if informal resolution efforts do not address the issue in a manner deemed satisfactory by the individual.
- (h) The expense of advocacy, if any, shall be borne by the individual.
- (i) The complaint manager shall:
 - (1) Explain to the individual the processes for resolution:
 - a. Informal resolution through the agency in accordance with He-M 204.07; or
 - b. Formal resolution through the department in accordance with He-M 204.08;
 - (2) Notify the individual of his or her rights described in (g) above; and
 - (3) Ensure that the safety of the individual is protected.
- (j) If the individual has a guardian, the agency staff person shall notify the guardian of the complaint.
- (k) Except as described in He-M 204.11, if the individual chooses to resolve the complaint formally:
 - (1) The complaint manager shall immediately forward the complaint to OCLS; and
 - (2) Within 3 business days, OCLS shall designate a complaint investigator for initiation of the formal resolution process in accordance with He-M 204.08.
- (l) A designated complaint investigator shall not be an employee of the CMHP nor shall an employee of one CMHP be designated to investigate a complaint at another CMHP.
- (m) Employees of the department or agency shall assist persons to file complaints.

- (n) Employees of the department or agency shall provide information to obtain advocacy services.
- (o) A complainant may request to keep his or her identity confidential throughout the complaint process.
- (p) If the confidentiality of the complainant interferes with the investigation and/or the resolution of the complaint, the complaint investigator or complaint manager shall:
 - (1) Notify the complainant that if his or her request for confidentiality in (o) above interferes with the investigation and resolution of the complaint; and
 - (2) Work collaboratively with the complainant to determine whether or not his or her identity will be revealed.
- (q) Except for as described in He-M 204.11, agencies shall maintain a record of complaints filed which contain the following information:
 - (1) The nature of the complaint with reference to the section(s) of He-M 309 that coincide with the alleged violation;
 - (2) The outcome of the informal resolution;
 - (3) The length of time to resolve the complaint from the time of the filing of the complaint through resolution; and
 - (4) Whether or not the complaint was forwarded for formal resolution.

He-M 204.06 Protection from Retaliation.

- (a) No individual or applicant for services shall be subject to any form of harassment or retaliation by any person under the jurisdiction of the department as a result of filing a complaint.
- (b) No employee of the department or an agency shall be subject to any form of discipline as a result of filing a complaint when such complaint is made in good faith.
- (c) Except when necessary to protect the health and safety of the individual and others, an agency shall not discontinue, amend, or otherwise disrupt services provided to the individual as a result of that individual or a person acting on the individual's behalf filing a complaint.

He-M 204.07 Informal Resolution.

- (a) The individual may choose to resolve the complaint through the informal resolution process.
- (b) The objective of informal resolution shall be to empower, engage, and assist the individual to resolve the problem through techniques such as negotiation and mediation.
- (c) Informal resolution shall be completed within 30 days of submission of the complaint, unless the complainant authorizes an extension of time.
- (d) If resolution cannot be achieved, the matter shall be subject to formal resolution as described in He-M 204.08.
- (e) The individual may request the initiation of the formal resolution process at any time during the informal resolution process.

(f) Discussions that occur during the informal resolution process shall be held confidential and not used as evidence in subsequent formal resolution proceedings and administrative hearings in this part.

(g) No complaint alleging retaliation, coercion, restraint, seclusion, abuse, neglect or exploitation shall be resolved utilizing the process outlined in this section.

(h) Matters referred to OCLS may be resolved informally with the consent of the individual.

He-M 204.08 Formal Resolution.

(a) The complaint investigator shall investigate and attempt to resolve the complaint to the satisfaction of the individual within 20 business days of receipt of a complaint or after the individual requests initiation of the formal resolution process unless the complainant authorizes an extension.

(b) The complaint investigator, if necessary to develop relevant facts, shall:

(1) Interview:

- a. The complainant;
- b. The individual;
- c. The guardian, if any;
- d. The respondent;
- e. Any witnesses to any incident on which the complaint is based; and
- f. Any clinical consultant whom the investigator utilizes to assist with the investigation; and

(2) Review information in the individual's record, policies and procedures, any physical and forensic evidence, and any other documents.

(c) Agencies shall allow designated complaint investigators unfettered access to the agency premises, staff, training records, and files of individuals who are the subjects of complaints, and any other agency documents or information relevant to the complaint investigation unless otherwise restricted by law.

(d) Two or more complaints involving the same act or incident shall be consolidated and treated as one complaint provided that:

- (1) Separate notices and copies of resolutions shall be sent to each individual; and
- (2) Each individual shall be given the opportunity to accept or appeal such resolution.

(e) The respondent may be represented by counsel during the interview conducted by the complaint investigator. However, the complaint investigator shall not share confidential information about the individual with the respondent or the respondent's attorney without the permission of the individual.

(f) The complaint investigator shall prepare and submit a report to the bureau administrator which includes:

- (1) The nature of the allegations;

- (2) A summary of the issues presented, including those that arose during the investigation;
- (3) The names of persons interviewed during the formal resolution process;
- (4) The investigatory findings of fact;
- (5) The dates of any reports made to BEAS or DCYF; and
- (6) A list of all documents reviewed.

(g) Based upon a review of the report submitted in accordance with (f) above, the bureau administrator shall determine whether or not the complaint is founded or unfounded within 10 business days of receiving the report.

(h) The bureau administrator shall issue a decision that includes:

- (1) Whether or not the complaint is founded;
- (2) The basis for the determination;
- (3) The corrective action that will be implemented; and
- (4) The appeal procedure.

(i) The bureau administrator shall forward to the individual and the agency:

- (1) The complaint investigator's report; and
- (2) The written final decision.

(j) Community mental health programs or community mental health providers shall implement corrective actions included in (h) above within 20 business days of the date of the decision.

(k) The community mental health program or community mental health provider shall provide documentation of implementation of corrective actions in accordance with (h) above to the bureau administrator no later than 20 days from the date of the decision.

He-M 204.09 Emergency Action.

(a) Agencies, peer support agencies, and emergency shelters shall take emergency action on all complaints when there exists an act or circumstance that, if not promptly corrected or resolved, will likely result in serious harm to the individual, other persons, or property.

(b) An agency, peer support agency, and emergency shelter shall immediately take steps to protect the safety of the individuals involved.

He-M 204.10 Role and Responsibilities of Complaint Managers and Complaint Investigators.

(a) Each complaint manager and complaint investigator shall complete an in-service training offered by the department, annually and within 3 months of being hired.

(b) The in-service training shall include:

- (1) A review of investigatory procedures;
- (2) Rights and advocacy resources; and

(3) Informal resolution methods.

(c) Participants shall sign in at the time of training as verification of attendance and OCLS shall maintain a list of those who have completed this training requirement.

(d) Each agency, emergency shelter, and peer support agency shall prominently post the names of the complaint managers or complaint investigator, as applicable and contact information for OCLS.

He-M 204.11 Special Requirements for Facilities. The following requirements shall apply to complaints relative to facilities:

(a) All complaints shall be submitted to the designated facility complaint investigator for resolution in accordance with He-M 204.05 and 204.06;

(b) Formal resolutions shall be completed in accordance with He-M 204.08, including investigating and attempting to resolve the complaint to the satisfaction of the individual, within 20 business days of receipt of a complaint or after the individual requests initiation of the formal resolution process unless the individual authorizes an extension of time;

(c) Designated facility complaint investigators shall submit reports containing the required elements described in He-M 204.08 (f) to the facility administrator;

(d) Based on the report, the facility administrator shall determine whether or not the complaint is founded and issue orders for corrective action, in the event that the complaint is founded, within 10 business days of receiving the report;

(e) Designated facility complaint investigators shall not have responsibility for:

(1) Direct provision of services to a individual on whose behalf a complaint is forwarded for investigation; and

(2) The risk management activities of the facility;

(f) The facility administrator shall forward the decision to the individual immediately;

(g) Facilities shall record the following information:

(1) The nature of the complaint;

(2) The method of the resolution, whether formal or informal;

(3) The outcome of the formal resolution, whether founded or unfounded; and

(4) The length of time to resolve the complaint from the filing of the complaint to the resolution; and

(h) Facilities shall report the information recorded in (g) above to OCLS annually.

He-M 204.12 Appeals.

(a) An individual may appeal in accordance with He-C 200 within 30 calendar days of the date of the decision pursuant to He-M 204.08 (h).

(b) Appeals shall be forwarded to the administrator, in writing, in care of the department's office of client and legal services.

(c) The appeal shall be immediately forwarded to the department's administrative appeals unit which shall assign a presiding officer to conduct a hearing or independent review, as provided in He-C 200.

(d) The burden of proof in appeals shall be determined in accordance with He-C 203.14.

(e) The presiding officer shall issue a decision with orders for corrective action.

(f) An award of money damages shall not be made except as reimbursement for the loss of any money held in safekeeping by the community residence or a facility in accordance with He-M 309 and 311.

APPENDIX

Rule	Statute Implemented
He-M 204.01	RSA 135-C:56-57, RSA 171-C:19
He-M 204.02	RSA 135-C:56-57, RSA 171-C:19
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